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# IN THE
# COURT OF APPEALS OF INDIANA

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| EUGENE WROBLEWSKI, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 01A02-0701-CR-73 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE ADAMS CIRCUIT COURT
The Honorable Frederick Schurger, Judge
Cause No. 01C01-0605-FC-10

**September 28, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

## Case Summary and Issues

Following a guilty plea, Eugene Wroblewski appeals his sentence for two counts of child molesting, both Class C felonies. Wroblewski raises two issues, which we restate as whether the trial court abused its discretion in sentencing Wroblewski, and whether his sentence is inappropriate given his character and the nature of the offenses. We affirm, concluding that although the trial court found an improper aggravator, such error was harmless, and that his sentence is not inappropriate.

## Facts and Procedural History

At some point between August 1 and August 31, 2005, Wroblewski parked his truck behind an apartment complex and molested his step-daughter, S.G., who was ten years old at the time. At some point between March 29 and April 30, 2006, Wroblewski again molested S.G. As a result of this conduct, and another alleged molestation occurring between March 29 and April 30, 2006, the State charged Wroblewski with three counts of child molesting. Wroblewski posted bond on May 30, 2006. On August 8, 2006, the State charged Wroblewski with invasion of privacy, a Class A misdemeanor, for violating a protective order. Wroblewski was arrested after police officers observed him exiting his pickup truck parked outside the house where S.G. lived. Wroblewski claimed that he believed he was allowed to be on the premises as long as S.G. remained inside the house. As a result of this conduct, the court revoked Wroblewski's bond. On September 29, 2006, the court set a plea deadline for December 1, 2006, and a jury trial for January 4 and 5, 2007. On December 1, 2006, Wroblewski entered into a plea agreement under which he agreed to plead guilty to

two counts of child molesting. In return, the State agreed to drop the third count and to make no specific recommendation as to the length of Wroblewski's sentence. On December 22, 2006, the trial court held a hearing and accepted the guilty plea. On January 18, 2007, the trial court held a sentencing hearing, at which S.G. testified that Wroblewski had touched S.G. inappropriately on other occasions, including a specific incident while the family was living in Detroit. S.G.'s mother, who was still married to Wroblewski, confirmed this incident in Detroit, and also testified that she had previously found large amounts of child pornography on Wroblewski's computer. S.G. and her mother both testified regarding S.G.'s emotional difficulties caused by Wroblewski's conduct. After hearing the testimony, the trial court made the following statement:

> The Court is directed to consider pursuant to Indiana Code 35-38-1.7.1 [sic] certain considerations in imposing sentence. The criteria that appear there, uh, certainly the conduct in Detroit that nothing was done about is a history. To me a lot of times I think you can reduce what we do in the adult courtroom down to dealing with children. When a child reaches for something and the parent consistently says no, the child develops a habit of not doing what the parent is training the child to do. When a child gets away with a behavior, the child assumes it's okay and keeps on going. Now in a lot of ways it sounds to me that you got away with this a couple of times, Mr. Wroblewski, so you kept on going until it blew up in your face. There is a prior history of this going on. The issue is how to deter it. There's a lot of vagueness in the record of your, uh, the first lady that you lived with that you had children with that won't let you see your natural-born children, and an exhaustion of attorney fees to continue the argument.[1] What does that mean? It certainly lends itself to supposition and that's the problem. It lends itself to supposition, but I definitely have the suggestion—or more than the suggestion—the testimony of prior conduct in Detroit that was sexual in nature or inappropriate more of what you would do between consenting adults than the conduct you would

[1] Wroblewski has children with another woman. At one point he had supervised visitation with these children, but no longer had visitation because the woman "was fightin it," and Wroblewski ran out of money to pay his attorney. Tr. at 105.

> with a daughter or step-daughter. This has been going on a long time and I think that is enough to give rise to an aggravator of a prior history of this conduct. You certainly violated the conditions of your pre-trial release. You violated a protective order while you were out on bond. You certainly were in the position of having the care, custody and control of the victim of the offense. You certainly have the issue that you have created in this child a great deal of unease towards adult males—probably something that's going to take a fair amount of counseling for her to work her way through. On the other side of the coin you have no prior criminal history. You've been a good family supporter. You pled guilty which saved not so much the time to the court, but the anxieties that that engenders into particularly the victims and their family. The seeking of treatment at the Bowen Center—I don't know how to read that the same as I don't know how to read the remorse. You certainly are remorseful. On the other hand is it remorse because you're likely to go to prison for this kind of conduct or is the remorse because you feel sorry for the harm to the child or done to the victim? Tough one to read. The fact that something didn't get done about this until after the charges were actually filed leads me to question the amount of personal remorse towards the damage to the victim and more so read it as you've really gotten yourself in trouble now and you feel horribly sorry that you're in trouble cause most people do, and I'm sure that you do feel that way. My job is to weigh these various factors and I find that the aggravators outweigh the mitigators by a substantial degree. The aggravators are just things that are very strong. The violation of the pre-trial release—it seems to me this has been going on for some time, or certainly that's indicated by the prior conduct in Detroit the fact that it was your stepdaughter. I give those far more weight and I think they outweigh the others. Nevertheless, I give you credit on the other parts.

Tr. at 121-24. The trial court then sentenced Wroblewski to eight years, with four years suspended to probation on each count, and ordered the sentences to run concurrently. Wroblewski now appeals.

## Discussion and Decision

### I. Propriety of Wroblewski's Sentence

#### A. Standard of Review

A trial court may impose any sentence authorized by statute and permissible under the Indiana Constitution "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). However, trial courts are still required to issue a sentencing statement whenever sentencing a defendant for a felony. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007). We will review a trial court's sentencing decision for an abuse of discretion, which occurs when the trial court's decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." Id. (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)). A trial court may abuse its discretion by finding aggravating circumstances unsupported by the record, omitting reasons "that are clearly supported by the record and advanced for consideration," or by noting reasons that are improper considerations as a matter of law. Id. However, the trial court no longer can be said to have abused its discretion by improperly weighing the aggravating and mitigating circumstances. Id.

If we find an error related to the trial court's sentencing statement, "we have the option to remand to the trial court for a clarification or new sentencing determination, to affirm the sentence if the error is harmless, or to reweigh the proper aggravating and mitigating circumstances independently at the appellate level." Cotto v. State, 829 N.E.2d

520, 525 (Ind. 2005). Additionally, we may exercise our authority under Indiana Appellate Rule 7(B) to review the sentence to determine if it is inappropriate given the nature of the offense and the character of the offender. See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007); Ruiz v. State, 818 N.E.2d 927, 929 (Ind. 2004).

B. Trial Court's Finding of Aggravating and Mitigating Circumstances

1. Impact on Victim

Wroblewski argues that the trial court erroneously found the effect of his actions on S.G. to be an aggravating circumstance. Wroblewski claims that the effects of his actions are merely those normally associated with the offense of child molesting, and the impact on S.G. is therefore an improper aggravating circumstance. Although we used to allow trial courts to consider the devastating emotional impact of molestation on the victim, e.g., Yoder v. State, 574 N.E.2d 929, 932 (Ind. Ct. App. 1991), trans. denied; Durham v. State, 510 N.E.2d 202, 204 (Ind. Ct. App. 1987), we have since switched course, albeit without explicitly overruling prior caselaw. We now allow such impact to serve as an aggravating circumstance only where the impact on the victim is different than that usually caused by the crime. McElroy v. State, 865 N.E.2d 584, 590 (Ind. 2007). In applying this rule, we have held that a trial court erroneously found this aggravator where evidence indicated that the victim of molestation was in need of counseling and had nightmares regarding the molestations because we could not distinguish these harms from those caused to other molestation victims. Simmons v. State, 746 N.E.2d 81, 91 (Ind. Ct. App. 2001), trans. denied. We have also found the emotional impact on the victim to be an improper aggravator where the trial court failed to

explain "how the defendant's actions had an impact of a destructive nature that is not normally associated with the commission of the offense of child molesting, or how this impact was foreseeable to [the defendant]." Comer v. State, 839 N.E.2d 721, 728 (Ind. Ct. App. 2005), trans. denied; see also Leffingwell v. State, 793 N.E.2d 307, 310 (Ind. Ct. App. 2003). The rationale of these decisions is that the legislature was apparently aware of the emotional harm caused by child molestation and considered it when it classified the crime as a Class C felony. Cf. Davenport v. State, 689 N.E.2d 1226, 1232-33 (Ind. 1997), clarified on reh'g, 696 N.E.2d 870 (noting that the emotional impact of murder "is accounted for in the presumptive sentence").

In this case, while the harm to S.G. is no doubt considerable, such harm does not appear to be any greater than that caused to other victims of child molestation. Therefore, the trial court abused its discretion in finding this aggravating circumstance.

2. Prior Conduct

At the sentencing hearing, Wroblewski admitted that he "like[s] to inappropriately touch children." Tr. at 104. He specifically admitted that there had been inappropriate sexual contact with S.G. while they lived in Detroit. S.G. testified that Wroblewski had touched her in a sexual manner on several prior occasions. S.G.'s mother also testified that she had found Wroblewski "quite a few times" with child pornography on his computer. Id. at 81. Although viewing child pornography is distinct from inappropriate touching, such viewing activity is related to child molestation, as both are sex crimes involving harm to children. See United States v. Norris, 159 F.3d 926, 929-30 (5th Cir. 1998), cert. denied, 526

U.S. 1010 (1999) (recognizing that those who view child pornography harm the children depicted in the material by perpetuating the abuse initiated by the creator of the material, invading the depicted child's privacy, and providing an economic motive for people to produce child pornography).

We conclude that the evidence in the record supports the trial court's finding of the aggravating factor relating to Wroblewski's past conduct. To the extent that Wroblewski argues the trial court abused its discretion by affording too much weight to this circumstance, this argument is no longer valid under Anglemyer.[2]

3. Cooperation with Police

Wroblewski argues that the trial court abused its discretion by failing to find Wroblewski's cooperation with police to be a mitigating circumstance. Wroblewski testified that while he was incarcerated awaiting trial, he wore a wire in jail for around six hours in an effort to aid a police investigation. We recognize that under certain circumstances, cooperation with police is a significant mitigating circumstance. However, Wroblewski has failed to explain why wearing a wire for six hours in an attempt to aid in the investigation of an unrelated crime should be a significant mitigating circumstance in regard to his molestations of his step-daughter. See Vazquez v. State, 839 N.E.2d 1229, 1234 n.6 (Ind. Ct. App. 2005), trans. denied. Indeed, as Wroblewski's cooperation came after he had been charged with the immediate crimes, his cooperation may be viewed as a pragmatic decision. See Glass v. State, 801 N.E.2d 204, 209 (Ind. Ct. App. 2004). Because the record does not

clearly indicate that Wroblewski's cooperation is a significant mitigating circumstance, we conclude that the trial court did not abuse its discretion in failing to note it as such.

3. Remaining Aggravators and Mitigators

The remainder of Wroblewski's argument regarding the trial court's finding of aggravating and mitigating circumstances relates to the weight afforded to the circumstances. As noted above, a trial court cannot abuse its discretion in this regard. See Anglemyer, 868 N.E.2d at 490. We will, however, tangentially address Wroblewski's arguments regarding the weight afforded to the aggravating and mitigating factors in the context of our assessment of the appropriateness of his sentence.

4. Effect of Improper Aggravator

Although we conclude that the trial court improperly found the impact on S.G. to be an aggravating circumstance, we also conclude that this error was harmless. Even without that aggravator, three weighty aggravating circumstances remain: Wroblewski's history of sexual misconduct with children; his position of trust with S.G.; and the fact that he committed a crime of invasion of privacy against S.G. while on pre-trial release. The facts that Wroblewski was in a position of trust with S.G. and had previously touched her inappropriately are particularly weighty aggravating circumstances. See Hart v. State, 829 N.E.2d 541, 544 (Ind. Ct. App. 2005) ("Abusing a position of trust is, by itself, a valid aggravator which supports the maximum enhancement of a sentence for child molesting."); Winters v. State, 727 N.E.2d 758, 762-63 (Ind. Ct. App. 2000), trans. denied (where trial

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[2] We note that Wroblewski filed his brief before our supreme court decided Anglemyer, at which

court had found an improper aggravating circumstance, remaining circumstances of defendant's position of trust with victim and the fact that the offense involved ongoing molestation supported maximum sentence); cf. Baber v. State, 870 N.E.2d 486, 494 (Ind. Ct. App. 2007) (concluding presumptive sentence was not inappropriate where the defendant violated a position of trust by repeatedly molesting his student). Wroblewski's commission of a crime while on pre-trial release was also a valid consideration. See Ind. Code § 35-38-1-7.1 (a)(6) (authorizing the trial court to consider as an aggravating circumstance that the defendant recently violated the terms of a pretrial release); cf. Brown v. State, 698 N.E.2d 1132, 1143 (Ind. 1998), cert. denied, 526 U.S. 1056 (defendant's commission of a crime after the commission of the instant offense is relevant to the weight afforded to a defendant's lack of criminal history). Therefore, we can say with confidence that the trial court would have ordered the same sentence even without considering the emotional harm caused to S.G.

## II. Appropriateness of the Sentence

### A. Indiana Appellate Rule 7(B)

When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). When determining whether a sentence is inappropriate, we must examine both the nature of the

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point this argument was not invalid.

offense and the defendant's character. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When conducting this inquiry, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007)

B. Appropriateness of Wroblewski's Sentence

Wroblewski argues that the trial court sentenced him to the maximum sentence, and that his sentence is therefore improper as he is not one of the "worst offenders," for who maximum sentences should be reserved. See Appellant's Br. at 17 (citing Haddock v. State, 800 N.E.2d 242, 248 (Ind. Ct. App. 2003)). However, although the trial court sentenced Wroblewski to a maximum sentence of eight years (with four years suspended) for each count, the trial court ordered that the sentences run concurrently. Therefore, Wroblewski did not receive a "maximum sentence." See Julian v. State, 811 N.E.2d 392, 403 (Ind. Ct. App. 2004), trans. denied. With the length of Wroblewski's sentence in mind, we turn to our examination of his character and the nature of the offense.

1. Nature of the Offense

In regard to the nature of the offense, Wroblewski repeatedly molested S.G., thereby knowingly causing severe emotional distress to his own stepdaughter, a child to whom he owed a duty to protect. Although, as noted above, the impact on S.G. was an improper aggravating circumstance, it is a factor we may consider relating to the nature of Wroblewski's offense. See Baber, 870 N.E.2d at 494; Singer v. State, 674 N.E.2d 11, 15 n.14 (Ind. Ct. App. 1996). We cannot say that an eight-year sentence with four years suspended to probation is inappropriate based on the nature of the offense.

2. Character of the Offender

In regard to Wroblewski's character, we recognize that he apparently has no criminal history.[3] This fact generally comments favorably on a defendant's character. See Ind. Code § 35-34-1-7.1(b)(6). However, the record indicates that Wroblewski had inappropriately touched S.G. in the past, and regularly viewed child pornography,[4] and therefore had not been leading a law-abiding life. See Roney, 872 N.E.2d at 207 (defendant had been using illegal drugs throughout his life); Bostick v. State, 804 N.E.2d 218, 225 (Ind. Ct. App. 2004) (defendant had a substance abuse problem and had been involved in a sexual relationship with a fifteen-year-old). By viewing child pornography, Wroblewski "enable[ed] and support[ed] the continuous and direct abuse and victimization of child subjects." Norris, 159 F.3d at 930. Although Wroblewski was not convicted of any crime regarding the viewing of this material, we may consider such behavior in determining the appropriateness of his sentence. See Beason v. State, 690 N.E.2d 277, 281 (Ind. 1998) ("Allegations of prior criminal activity need not be reduced to conviction in order to be considered a proper aggravating factor."); Hines v. State, 856 N.E.2d 1275, 1281-82 (Ind. Ct. App. 2006), trans. denied (holding that trial court could consider defendant's admission that he had molested a child in addition to the victim when sentencing defendant for child molesting). The positive nature of his lack of criminal history is additionally reduced by the fact that he committed a

[3] Wroblewski was convicted of invasion of privacy, but this conviction came after he committed the instant offenses. See Brown, 698 N.E.2d at 1143 (recognizing that evidence of crimes committed after the instant offense is not relevant to determining the defendant's criminal history prior to committing the instant offense).

crime while he was on pretrial release. See Brown, 698 N.E.2d at 1143.

Wroblewski pled guilty to the instant offenses, and we recognize that a guilty plea normally comments positively on a defendant's character, as the plea indicates a willingness to take responsibility for one's actions. See Cloum v. State, 779 N.E.2d 84, 90 (Ind. Ct. App. 2002). However, the positive effect of this plea is tempered somewhat by the fact that Wroblewski received the benefit of the State dropping a charge against him in exchange for his plea. See Fields v. State, 852 N.E.2d 1030, 1034 (Ind. Ct. App. 2006), trans. denied (noting that the defendant "received a significant benefit from the plea, and therefore it does not reflect as favorably upon his character as it might otherwise").

The record also indicates that Wroblewski expressed remorse for his actions. However, as the trial court noted, it is difficult to discern whether Wroblewski was expressing remorse for the harm caused to S.G. or in regard to the situation in which he had placed himself. Significantly, although Wroblewski had previously known that he had a problem controlling his desire to touch young children inappropriately, he did not seek counseling until after he was charged with the instant offenses. When asked why he did not seek counseling after the incident in Detroit, Wroblewski responded: "I was looking for a job," and "I didn't think that I was ordered." Tr. at 106-07. This failure to seek help until after criminal charges were filed also tends to diminish Wroblewski's expressions of remorse and efforts to combat his illicit desires.

Similarly, any positive impact Wroblewski's attempt to aid police may have on his

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[4] A person who possesses a digitized image depicting sexual conduct by a child commits a Class D

character is reduced as it came after he was actually charged with the instant offenses. Wroblewski has failed to explain how his actions in this regard were anything more than an attempt to mitigate his punishment.

In sum, the fact that Wroblewski abused a position of trust to repeatedly molest his stepdaughter speaks more to Wroblewski's character than do any of the factors discussed herein. We conclude that Wroblewski's sentence is not inappropriate based on his character.

## Conclusion

We conclude that although the trial court found an improper aggravating circumstance, such error was harmless as the remaining aggravators support the enhanced sentences. We also conclude that the sentence is not inappropriate given the nature of the offenses and Wroblewski's character.

Affirmed.

KIRSCH, J., and BARNES, J., concur.

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felony. See Ind. Code § 35-42-4-4(c).